IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOSE GRACIA, ET AL, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. B-91-146
BROWNSVILLE HOUSING AUTHORITY, ET AL, Defendant.	§	

ORDER

(Filed Aug. 18, 1993)

Before the Court are the following motions: Brownsville Housing Authority's motions to dismiss for failure to state a claim, for summary judgment as to Section 1983 claims, for summary judgment as to the defense of sovereign immunity, for judicial notice of limited liability; Intervenor Healthsouth Rehabilitation Center's motion to file amended intervention; Plaintiff's motions to strike insufficient defenses pursuant to F.R.C.P. 12 (f), to strike experts, to take judicial notice, and responses thereto.

FACTS

The circumstances of this case are evidenced by pleadings, discovery and affidavits on file with the Court. On July 24, 1988 the plaintiffs, minor children and parents of deceased child were visiting relatives at Brownsville Housing Authority property located at 1817 Lincoln

street Brownsville Texas. While at the property the children were sitting in a hammock secured to two trees. One of the trees, a large allegedly dead avocado tree, collapsed and fell on the children causing the death of one child, Jose Angel Gracia, III and rendering a second child, Monica Gracia, a ventilator dependent quadriplegic.

The plaintiffs brought suit against the defendants maintaining that their constitutional rights were violated in the taking of their life and liberty by the defendants' "systematic and deliberate failure to follow mandatory Federal statutes, laws, regulations, and codes" and alleging various state causes of actions.

MOTIONS

Brownsville Housing Authority's (B.H.A.) motions can be divided into two sections, those concerning alleged federal causes of action and those concerning state causes of action. The Court will discuss the federal issues first.

The Defendants maintain that the Plaintiffs have failed to state a claim under 42 U.S.C. § 1983, and in the alternative should one be stated, a summary judgment is proper in that thee are insufficient allegations concerning the presence of a custom or policy which resulted in the deprivations of rights, and that there is no evidence of deliberate indifference of a constitutional right.

Section 1983 provides a federal remedy for "the deprivation of any rights, privileges or immunities secured by the constitution and laws." 42 U.S.C. § 1983. The Supreme Court has recognized that when there is a

governmental deprivation of a right secured by a federal statute Section 1983 provides a remedial cause of action, unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose private enforcement, or the statute does not rise to the level of an enforceable right. *Golden State Transit Corporation v. City of Los Angels* [sic], 110 S.Ct. 444 (1989), citing, *Penhurst State School and Hospital v. Halderman*, 450 U.S. 1, 101 S.Ct. 1531 (1981); *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457 (1984). The Supreme Court has set forth a frame work for analyzing whether a federal statute creates an enforceable right within the meaning of Section 1983. *See, Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517 (1990). First the Court must consider if the provision or provisions in question were intended to "benefit the putative plaintiff". *Id.* If the answer is yes, then there is an enforceable right unless one of two exceptions apply. First, the court must consider whether the statute reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation, and second whether the interest the plaintiff asserts is too vague, such that it is beyond the competence of the judiciary to enforce. *Wright v City of Roanoke Redevelopment and Housing Authority*, 107 S.Ct. 766 (1987); *Penhurst State School and Hospital.*

In *Wright* the Supreme Court recognized a Section 1983 cause of action against a housing authority stemming from an amendment to the Housing Act of 1937. In doing so the Court found that remedial devices in the Housing Act, which do not contain a provision for a

private judicial remedy, were not such that they demonstrated a Congressional intent to foreclose a private Section 1983 remedy. *Wright* at 771-772. The Supreme Court, in holding for the private remedy necessarily found that the interest asserted by the plaintiff was within the competence of the judiciary to enforce. *See, Id.*

In the case at hand, the Plaintiffs maintain that they have a cause of action pursuant to Section 1983 for deprivation of rights secured by federal statutes. In their petition the plaintiffs have alleged violations of federal statutory rights secured under federal statutes, laws, regulations, and codes demonstrated by the annual contribution contract with H.U.D., the federally mandated dwelling lease, and specific provisions of state and city laws as well as rules and regulations of the B.H.A. that have been incorporated by federal law. Specifically the plaintiffs cite in their petition:

> The Code of Federal regulations, 24 CFR § 966.4(d),(e)(1)(2)(3)(4), f(4)(5)(6)(7), (g); § 966.6(c); § 968.101(a); § 968.105; § 968.115(a)(b); § 968.201; § 968.203; § 968.205; § 968.215 (a)(b)(c); § 968.240(a); § 968.251 (1988 & 1990)
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> HUD, Consolidated Annual Contributions Contract, Part I, HUD form no. 53010, § 5, 7, 13, 14(d)(2) (Nov. 1969).
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> HUD, Consolidated Annual Contributions Contract, Part II, HUD form no. 53011, art. I, §§ 101, 102; art. II, § 201, 203,209; art. III, § 305, 307 (Nov. 1969).
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> HUD, Public and Indian Comprehensive Improvement Assistance Program Handbook,

7485.1 rev-4 (Dec. 1989), ch. 1, para 1-1, 1-2,1-3a, 1-3b, 1-3d, 1-3q, 1-3r,1-3t, 1-3x, 1-4a; Ch. 2 para 2-3b(3)(f), 2-3b(5).

HUD, Public Housing Modernization Standards Handbook, 7485.2 rev-1 (Feb. 1985), ch. 1, para 1-1, 1-2,1-3; Ch. 3, para 3-1, 3-5, 3-8, 3-10; Ch. 10, para 10-3, 10-3(a), 10-3d.

Standard Hous. Code § 101.6; 103,2,1; 104; 202; 307.1; 307.4 (Southern Building Code Congress International, Inc. 1985 & 1988 editions).

Standard Bldg. Code § 101.6 (Southern Building code Congress International, Inc. 1982 & 1985 editions).

Housing Auth. of Brownsville, Tex. Dwelling Lease, sec. 9A para 1-4 (Jan. 1972 amended April 1, 1985).

Brownsville, Tex. Hous. Code ch. 17, art. I, § 17.1(a),(b); art. II § 17-16, 17-18 (1974, 1978, 1985).

Brownsville Tex. Landscape Code ch. 26, art. IX, § 401, 403 (2)(3) (1987); (Ord. No. 897, § 1, 5-4-78; Ord. No. 87- 1100.05, § 5, 7-7-87.

Brownsville, Tex., Bldg. Code ch. 9, art. II §§ 9-3, 9-15 (1985) (including ordinance no. 723-c, 9-10-85).

Housing Auth. of Brownsville, Tex., By-laws, art. II, § 4, 5 & 8.

Housing Auth. of Brownsville, Tex., Manual of Operations, Part Vii, Statement of Personal Policies Sections: 1(f), 2(a)(b), 5(a)(1)(2), 6(b), 7(b)(6)(16), 12, 21.

Housing Auth. of Brownsville, Tex., Manual of Operations, Supplement to Part VIII, Maintenance Plan A1 a, A1c(1)(e)(i)(l)(m), B6, B.7.

Housing Auth. of Brownsville, Tex., Manual of Operations, Part VII, § 20, Exhibit No. 1 Job Description for Executive Director, No.s, 2, 3, 4, 5, 8, 9, 12, 13, 14; Job Description for Maintenance Superintendent, No.s 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14; Job Description for project managers, No.s 6, 7, 8, 12.

Tex. Loc. Gov't. Code Ann. § 392.031(a), 392.038, 392.041(a), 392.051(b)(c), 392.052(g)(f)(3), 392.062(a)(b) (Vernon 1987 & Supp. 1989); § 392.004, 392.006 (Vernon Supp. 1993).

Upon consideration of the aforementioned statutes, code provisions, regulations, and federally mandated contract provisions the Court is persuaded the plaintiffs have at the least stated a claim pursuant to Section 1983. In analyzing the applicable laws it is the opinion of the Court that the provisions in question were intended by Congress to benefit the "putative plaintiff" in this case. Further, the mandatory nature of the maintenance plans and required inspections, combined with the fact these plans were implemented in order to receive government contributions leaves the Court with no other conclusion but that these were binding obligations. Likewise, the Court is inclined to agree with the Supreme Court's determination in *Wright*, that when considering the Housing Act and related statutes and regulations there is absent a Congressional intent to foreclose private remedies pursuant to Section 1983 and that the Judiciary is indeed competent to enforce them. Therefore the

Defendants' Motion to dismiss for failure to state a claim is hereby DENIED.

In the alternative the Defendants have asserted that a summary judgment is proper on the federal Section 1983 causes of action. A summary judgment is only proper when no issue of material fact exists and the movant is entitled to a judgment as a matter of law. F.R.C.P. 56; *Mississippi Poultry Ass'n, Inc. v. Madigan* 992 F.2d 1359, 1362 (5th Cir. 1993). The standard applied is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one side must prevail as a matter of law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251-252 (1986).

The Defendants properly assert that in order to maintain a cause of action under Section 1983 against a municipality or agency thereof, the Plaintiff must allege and assert a custom and policy that resulted in the deprivations alleged. *Pembaur v. Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298 (1986). Similarly, the Defendants properly assert that an allegation of mere negligence will not support a Section 1983 claim as a matter of law. *City of Kentucky v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989); *Mouille v. The City of Live Oak, Texas*, 977 F.2d 924 (5th Cir. 1992). Rather, the Plaintiff must allege more than mere negligence, a conscious indifference to the enforceable right asserted by the Plaintiff. *See, Mouille.*

Even though these propositions of law are accurate, the Court is not of the opinion that a summary judgment is proper in this case. Upon consideration of the summary judgment evidence, consisting of pleadings, discovery,

and affidavits on file in this case, the Court has determined that a custom or policy concerning the actions or rather the lack of action on the art of the Defendants is at the least plead by the Plaintiffs such that there is a material issue of fact in existence. The Plaintiffs allege and demonstrate through discovery sufficient issues concerning their allegations that it was the Defendants' custom and policy to systematically and deliberately fail to follow mandatory Federal statutes, laws, regulations, and codes such that there is sufficient disagreement to submit them to a jury.

The Court is equally persuaded that there is sufficient evidence concerning deliberate indifference as to constitute a material issue of fact. Therefore, it is the opinion of the Court that the issues presented in the Defendants' Motions for Summary Judgments are not so one sided as to prevail as a matter of law, and accordingly they are hereby DENIED.

The issues concerning federal questions having been determined the state issues remain. The defendant B.H.A. maintains that it is a governmental unit of the state, and as such is entitled to governmental immunity and it's [sic] liability, if any at all, is therefore limited by the Texas Tort Claim Act. In that connection B.H.A. requests the Court to take judicial notice pursuant to Federal Rules of Evidence 201 of their asserted limited liability. The Plaintiffs maintain that Brownsville Housing Authority is a political subdivision of the City of Brownsville and as such is not entitled to sovereign immunity for its proprietary acts. In other words they maintain B.H.A. is a municipal unit and because its acts were proprietary, and

not listed as excepted, they fall outside of the Texas Tort Claims Act.

The Defendants initially relied on Tex. Loc. Gov't Code Ann. § 392.006 delineating housing authorities as units of state government and defining their actions as governmental rather than proprietary, however this statute was not in effect at the time the Plaintiffs' actions accrued. *See* V.A.T.S. *Local Government Code* § 392.006 (effective August 28, 1989). The Defendants now assert that prior to § 392.006 housing authorities were considered units of state government whose actions were governmental, and that the 1989 statute was merely a codification of existing law.

In support of this proposition the Defendants assert that B.H.A. cannot be an agency of the municipality because the city of Brownsville does not maintain any control over B.H.A., which is a necessary element of any agency. Additionally the Defendants maintain that this is an issue of first impression.

The Defendants are correct in asserting that case law in this area is limited, however this is not a case of first impression. Texas Courts have held that housing authorities are divisions of the municipality and that they exist only with the consent of the municipality. *See, Meirs v. Housing Authority of City of Dallas,* 266 S.W.2d 487, 490 (Tex. Civ. App. – Dallas, 1954) (266 S.W.2d 842 (Tex. 1954 – answers to certified questions); *Aetna Casualty and Surity Co. v. Glidden Company,* 283 S.W.2d 440, 441 (Tex. Civ. App. – Eastland, 1955, *Rev'd on other grounds*), 291 S.W.2d 315 (Tex. 1956). The city of Brownsville does in fact maintain some control over the B.H.A. as evidenced by

Tex. Loc. Gov't Code Ann. § 392.011 (Vernon 1988) (Power to create housing authority); Tex. Loc. Gov't Code Ann. § 392.031 (Vernon 1988) (Power to appoint housing commissioners); Tex. Loc. Gov't Code Ann. § 392.037 (Vernon 1988) (Power to designate housing commission chairman); Tex. Loc. Gov't Code Ann. § 392,041 (Vernon 1988) (Power to remove commissioners). Moreover, section 101.001 of Vernons Civil Practice and Remedy Code (effective 1987), while specifically naming political subdivisions falling under its purview, does not list housing authorities as units of state government. In fact, the Texas Legislature in 1989 specifically enacted Loc. Gov't. Code § 392.006, naming housing authorities as units of state government whose functions were governmental in nature, to remedy the situation. For these reasons it is the opinion of the Court that prior to the enactment of Loc. Gov. Code § 392.006 B.H.A. was a political subdivision of the City of Brownsville and therefore the next inquiry involves its functions.

Texas Civil Practice and Remedies Code § 101.0215 (effective Sept. 1987) (Texas Tort Claim Act) mandates that municipalities have limited liability for their governmental functions and recognizes the continuing existence of the prior rule excluding from sovereign immunity proprietary functions. Tex. Civ. Prac. and Rem. Code Ann. § 101.0215. In general, § 101.0215 lists those functions that are governmental or that at one time were considered to be proprietary but are now codified as governmental. *See, Id.* When a court is making a determination concerning a municipal function merely checking the laundry list of governmental functions is not sufficient, further analysis under the act is required to

determine potential liability. *See, McKinney v. City of Gainesville,* 814 S.W.2d 862 (Tex. App. 2nd Dist. 1991); *Alon v. City of DeSoto,* 852 S.W.2d 530, (Tex. App. – Dallas, 1992). Notwithstanding, it is important to note that housing is not listed under § 101.0215 as a governmental function and the Texas legislature felt is necessary to classify or reclassify it as a governmental function in 1989. *See,* V.A.T.S. *Local government Code* § 392.006 (effective August 28, 1989).

In differentiating between government and proprietary functions under the language of the statute Texas courts ask if the functions are undertaken for the benefit of private enterprise or a resident of the municipality or are they undertaken for the interest of the general public. *See, City of Houston v. Southwest Concrete Construction Inc.,* 835 S.W.2d 728 (Tex. App. – Houston [14th district] 1992); V.A.T.S. *Local government Code* § 392.006 (effective August 28, 1989). In applying the aforementioned principals it is the opinion of the Court that prior to 1989 the functions of the B.H.A., i.e. housing, were proprietary in nature in the they were discretionary and undertaken for specific residents. Therefore the Defendants' motion for summary judgment on sovereign immunity is hereby Denied.

The Court does recognize that Tex. Loc. Gov't Code Ann. § 392.103 was in effect prior to the events in this case and accordingly grants the Defendants' Motion to take judicial notice pursuant to Federal Rules of Evidence 201 as to § 392.103.

In regard to Healthsouth Rehabilitation Center's motion to file third amended complaint in intervention the Court acknowledges and recognizes their right to

intervene. The Court further reserves its determinations to any objections concerning the character of the intervention and the type of lien asserted until such time as the Court chooses to make a determination.

The remaining motions on file are the Plaintiffs' motions to strike insufficient defenses, motion to strike Defendants' experts and motion to take judicial notice. The Court reserves its decision concerning the plaintiffs' proposed judicial notice until formal pretrial. The Plaintiffs' motion to strike defenses is brought pursuant to F.R.C.P. 12(f). Specifically, the Plaintiffs attack the defenses of sovereign immunity and limited liability asserting that B.H.A.'s contributions contract Housing and Urban Development and its liability insurance contract prohibit B.H.A. from asserting those defenses. A plain reading of the provisions in the contribution contract demonstrates that the referenced areas define B.H.A.'s insurance requirements and that the insurance contract provisions cited concern coverage issues between the insured and insurer. The Plaintiffs contentions in these matters are misplaced. Notwithstanding, the Court is of the Opinion that the matters concerning these defenses have been resolved infra in this order, to the extent that these matters are asserted pursuant to 12 (f) the Court Denies the Plaintiffs motion to strike defenses.

The last motion concerns a discovery issue. The Plaintiffs move to strike Defendants' experts. Inasmuch as these experts apprear to have been noticed timely this motion will be denied. However, the Plaintiffs shall be allowed to depose the Defendants' experts and designate rebuttal experts who may in turn be deposed by the

Defendants. The deadline for this extension shall be September 15, 1993 and shall not exceed the scope designated above.

CONCLUSION

In summary, the defendant Brownsville Housing Authority's motions to dismiss for failure to state a claim, for summary judgment as to Section 1983 claims, for summary judgment as to the defense of sovereign immunity, for judicial notice of limited liability are hereby DENIED. The Court does take judicial notice of Tex. Loc. Gov't. Code Ann. § 392.103. Healthsouth Rehabilitation Center's intervention is recognized and determination as to the character of the lien is reserved. The Plaintiff's motions to strike insufficient defenses pursuant to F.R.C.P. 12 (f) is DENIED to the extent that it is brought pursuant to F.R.C.P. 12 (f) and premised on the allegations in the Plaintiffs' motion. Lastly Plaintiffs' motion to strike experts is DENIED and Discovery shall proceed as outlined herein above.

DONE at Brownsville, Texas this 18th day of August, 1993.

/s/ Filemon B. Vela
Filemon B. Vela
United States
District Judge